IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)

Description of case

A.O. 345 of 2004.

Naval Kishore ……. Petitioner.

Versus

Ganesh Singh and Others …… Respondents.

Date of decision :24, November 2004

For the approval of:

Hon'ble Mr. Justice P.C. Pant .

- Whether the order/ judgment should be sent to the reporters of reporting? ( )
- Whether the reporters be allowed to see the
- judgment? ( )

Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Civil Appeal from order No. 345 of 2004

Shri Naval Kishore
S/o Shri Sudhalal
R/o Village Kathur, Patti
Sitonyun, District –Pauri Garhwal
Uttaranchal …….Plaintiff/Appellant.

Versus

1. Shri Ganesh Singh
   S/o Shri Govind Singh
   R/o Village KHOLA, Patti
   Sitnosyun, District, Pauri-Garhwal
   Uttaranchal
2. Shri Harsh Mani
   S/o Shri Gunthi Das
   R/o Village REE, Patii Kandwalsyun
   District : Pauri Garhwal
   Uttaranchal.

4. Shri Vikram Singh Bisht
   Returning Officer
   Pramukh and Up-Pramukh Election
   Kot Block, District :Pauri Garhwal
   Uttaranchal ……Respondents

Mr. Alok Singh, Sr. Advocate assisted by G.S. Negi
Learned counsel for the appellant.
Mr. L.P. Naithani, Sr. Advocate, assisted by
Mr. S.K. Posti, Learned counsel for the respondents.

Hon'ble Prafulla C.Pant,J.

This appeal is preferred under section 49 of U.P. Kshesttra Panchayat (Election of Pramukh and Up-Pramukh) Rules, 1994, and is directed against judgment and order dated

4th of September, 2004 passed in election petition no. 42 of 2003, by Shri V.K. Jain, Learned District Judge, Pauri.

2. Brief facts of the case are that appellant Naval Kishore, respondent no.1 Ganesh Singh, and respondent no. 3 Harsh Mani, were candidates for election to the post of Block Pramukh of KOT (District Pauri). The election was held on 17.05.2003 under the supervision and control of Returning Officer/ Election Officer (respondent no.3). The counting of votes was also done on the same day. In the counting of votes of first preference, the appellant Naval Kishore, secured nine votes, respondent Ganesh Singh secured eight votes, and remaining six votes were polled in favour of respondent no. 2 Harsh Mani. As per the rules, Shri Harsh Mani, being the person who secured lowest number of votes got eliminated and executed from the run and his second preference votes were counted. It appears that out of the six votes only in one ballot paper, second preference was recorded which was counted in favour of respondent Ganesh Singh. And as such now both Naval Kishore (Appellant) and Ganesh Singh (respondent no. 1) got tied up, each securing nine votes. The Returning Officer, considering that Naval Kishore has secured more number of first preference votes, declared him elected. Shri Ganesh Singh aggrieved by the said declaration, filed an election petition under rule 35 read with rule 38 of U.P. Kshetra Panchayat (Election of Pramukh and Up-Pramukh) Rules, 1994 (hereinafter for brevity, the Rules) before the District Judge, Pauri. In the election petition, it is alleged that one vote counted in favour of the defendant –appellant was invalid vote as the secretary was violated in polling the same. It was also alleged in the election petition by the plaintiff (respondent no. 1) that Returning Officer was in collusion with the defendant-appellant as he did not order recounting even after request made in this regard by him. Contesting the election petition, the

defendant appellant deined allegations of violation of secrecy in polling of any of the votes. He defended the result declared by the Returning Officer and alleged that the same was done in accordance with law. Learned District Judge, after perusing the pleadings, framed the following issues:

1. Whether secrecy was violated in one of the votes, as alleged in the election petition, if so it's effect?
2. Whether the election petition is not maintainable (as alleged by the contesting defendant)?
3. Whether the petitioner is entitled to any compensation?

The District Judge, Pauri after recording evidence and hearing the parties, passed the impugned order dated 04.09.2004, where by the allowed the election petition and set aside the declaration of election result in favour of Naval Kishore (defendant appellant), and directed the Returning Officer to recount the votes and to declare the result afresh. While allowing the election petition, learned District Judge also observed that one vote counted in favour of the defendant-appellant was invalid. Therefore, aggrieved by the judgment and order of the District Judge, Pauri, this appeal has been filed.

4. I heard learned counsel for the parties and perused the affidavit, counter affidavit along with the annexures annexed there to, part from the original record of the election petition summoned from the court below, and also considered the case laws cited by the contesting parties.

5. Before further discussions, it is pertinent to mention here the relevant provisions of law applicable to the case. Rule 26 of U.P. Kshettra Panchayat (Election of Pramukh and Up-Pramukh) Rules, 1994, reads as under:-

"26 ***Procedure at the counting*** *:- (1) As soon as the poll is closed the Returning Officer Shall, in the presence of the contesting candidates and the members who may be present, proceed to count the votes.*

(2) The Returning Officer shall open the ballot box and shall-

(a) Count the number of ballot papers taken out therefrom and record it in a statement;

(b) Scrutinize the ballot papers and separate those which in his opinion are valid from those which in his opinion are invalid endorsing on the later the word "rejected" with reasons for such rejection;

(c) Arrange all the valid ballot papers in parcels according to the first preference recorded for each candidate.

(3) A ballot paper shall be rejected as invalid on which:-

(a) The No. 1 is not marked; or

(b) The No. 1 is marked opposite the name of more than one candidate or is so marked as to render it doubtful to which candidate it is intended to apply; or

(c) The No.1 and some other numbers are marked opposite the name of the same candidate; or

(d) Any work is made by which the voter may afterwards be identified.

Rule 28 and 29 of same rules are also reproduced as under:

28. **Recounting: -** The Officer may, either on his own initiative or at the instance of a candidate, recount the votes, whether once or more than once, when the Returning Officer is not satisfied as to the accuracy of the previous counting.

Provided that nothing herein contained shall make it obligatory on the Returning Officer to recount that same votes more than once.

***29. Declaration of result**: - When the counting of the votes has been completed and the result of the voting has been determined, the Returning Officer shall in the absence of any direction by the State Election Commission to the contrary, forthwith-*

(a) declare the result to those present;

(b) report the result to the District Magistrate, the State Election Commission and the State Government;

(c) prepare and certify a return of the election in Form VIII; and

(d) seal up in separate packets the valid ballot papers and the rejected ballot papers and record on each such packet a description of its contents."

6. Sub-rule (3) of rule 26, provides only four conditions for rejecting a ballot paper as invalid. Clause (a), clause (b) and clause (c) as mentioned above, are not applicable to the present case as no such ballot paper is found. Clause (d) of said sub-rule (3) provides that a ballot paper shall be rejected as invalid on which any mark is made by the voter, by which voter may, afterwards, be identified. Learned District Judge in his impugned judgment has mentioned that one of the votes, counted in favour of the defendant – appellant had a marking of first preference vote as '1' in box, opposite his name and simultaneously, a bracket against his name was made and mark '(1)' was mentioned therein. As such at two places in the same ballot paper the voter has indicated his first preference of vote to the same person. Learned District Judge, was of the view that in doing so, the secretary of voting has been violated and this vote should have been rejected. This Court is of the opinion

that in no way such a ballot can be said to have violated secrecy. Neither the voter has put his signature or identification mark to indicate that particular person has given that vote. Neither the Returning Officer nor the District Judge nor any of the parties can tell which voter has given this vote. That being so, I fail to understand how the District Judge has come to the conclusion that the vote should have been rejected under clause (d) of sub-rule (3) of rule 26 quoted above. Learned Counsel for the respondent no. 1, argued that by making another '1' against the same name, is also a kind of identification, which amounts to violation of secrecy. But he failed to show me that which voter has given the vote. What is important in a election is the intention of the voter about which there is no doubt that aforesaid first preference vote was given in favour of the defendant- appellant. In my opinion, the Returning Officer has rightly counted the vote, as there was no doubt as to the intention of the voter nor was disclosure of the identity of the voter in it. The ground on which vote could have been rejected, are mentioned in rule 26 quoted above, and the vote found invalid by the District Judge, in the opinion of this Court, is not covered in any of the four clauses.

7. Clause (2) of instruction 1, contained in schedule IInd of the Rules provide that the expression "first preference" means the number '1' marked opposite the name of the candidate, the expression "second preference" similarly means the number '2' the expression "third preference" the number '3' and so on. Instruction 6 of the same schedule IInd of the Rules also appears to have been complied in eliminating and excluding Shri Harsh Mani, the candidate who polled the lowest number of votes. As such from the evidence on record, I see no illegality on the part of the Returning Officer.

8. My attention was drawn on behalf of the respondent no.1 to the principle of law laid down in Ram Kishan Vs. State Election Commission (2003) 2 UPLBEC Pg. 1340, and it is argued that the Returning Officer should have accepted the request of the respondent no. 1 regarding recounting as under rule 28, he could have done so even on his initiative. I do agree with the principle of law and the submission to the above extent but merely because the Returning Officer did not think it proper to recount the votes, it does not vitiate the counting in election in question, for the reason that only 23 votes were casted, and the number of votes were in such a small number that recounting might have been felt un-necessary by the returning officer. As such in the circumstances, I see nothing wrong on the part of the Returning Officer if he has not ordered recounting.

9. Shri L.P. Naithani, Sr. Advocate, appearing on behalf of respondent no. 1 also relied on the principle of law laid down in Sunil Kumar Vs. State of U.P. (2004) 1 UPLBEC Pg 258 and contended that there can be no dispute to settled legal position that when the stature provides for a particular procedure, the authority has to follow the same, and it cannot be permitted to act in contravention of the same. I am in full agreement with the principle of law relied. However, it does not help the respondent no. 1, as, in the present case, I see no provision of procedure, violated by the Returning Officer.

10. Lastly, on behalf of the respondent no. 1, a reference was made before this Court to the case law reported in T.A. Ahammed Kabeer vs. A.A. Aziz Judgment Today, 2003 (4) S.C. Pg. 110, and it was submitted that the power to direct inspection of ballot paper can be exercised by the election tribunal and once that is done, if the illegality is found, the tribunal should not shut its eyes even after there had been a technical defect in doing so. This Court feels that facts in the present case are different as there appears no illegality in the

counting. Marking clearly first preference to a candidate in box (meant for it) opposite his name and also at the end of his name in bracket on the same line, is no illegality under any of the rules. Rather the voter has expressed his intention to make himself doubly sure that his vote is counted only to the person he has voted for.

11. For the reasons, as discussed above, and in view of the principle of law laid down in Lalit Mohan Pandey vs. Puran Singh & others (2004) 6 S.C.C. 626, and one reported in Jibontara Ghatowar vs. Sarbnanda Sonowal & others judgment today 2003 (5) S.C. Pg. 353, this Court comes to the conclusion that the finding as to the invalidity of one vote, and other findings based on said finding by the learned District Judge, Pauri, are liable to be set aside.

12. Accordingly the appeal is allowed. The judgment and order dated 06.09.2004 passed by the Distict Judge, Pauri, is set aside. The declaration of result made by the Returning Officer on 17.05.2003, is up held. No. order as to costs.

(Prafulla C.Pant,J.)

Dt. November 24, 2004
Sweta